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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

ARMANDO BICHARA,

Defendant and
Appellant.

B291045

(Los Angeles County
Super. Ct. No. PA082907)

APPEAL from judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Affirmed and remanded.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Susan Sullivan Pithey,
Supervising Deputy Attorney General, Mary Sanchez,
Deputy Attorney General, for Plaintiff and Respondent.

In his first trial, defendant and appellant Armando Bichara was convicted by jury of the first degree murder of Maria Ontiveros (Pen. Code, § 187 [count 1])¹ and the kidnapping of Guadalupe Montellano (§ 207, subd. (a) [count 3]).²

The trial court sentenced Bichara to an indeterminate prison term of 100 years to life, plus a determinate term of 6 years, calculated as follows: 25 years to life for the murder conviction, which was tripled pursuant to the three strikes law (§ 1170.12, subd. (c)(2)(A)(i)); 25 years to life for the kidnapping conviction pursuant to the three strikes law (§ 1170.12, subd. (c)(2)(A)(ii)); a 5-year term for a prior conviction (§ 667, subd. (a)(1)); and an additional 1-year term based on the jury's finding Bichara personally used a dangerous and deadly weapon, a knife, in murdering Ontiveros (§ 12022, subd. (b)(1)).

On appeal, we reversed the murder conviction, affirmed the kidnapping conviction, and remanded to the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant was found not guilty in count 2 of dissuading a witness. (§ 136.1, subd. (b)(1).)

trial court to allow the prosecution to retry the murder charge.

Following retrial, the jury convicted Bichara of willful, deliberate, and premeditated murder (§ 187), with personal use of a knife (§ 12022, subd. (b)(1)). Bichara was again sentenced to an indeterminate prison term of 100 years to life, plus a determinate term of 6 years.

In this appeal, Bichara contends that his murder conviction must be reversed because members of the jury saw him in restraints in violation of his rights to due process and a fair trial. He further contends that we must remand the matter to the trial court to allow it to exercise its discretion to strike his five-year prior serious felony conviction enhancement under section 667, subdivision (a)(1) in count 1, pursuant to Senate Bill No. 1393, and for the trial court to recalculate his custody credits as required. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) § 1.) The Attorney General concedes the sentencing issues, but challenges Bichara’s constitutional claim.

We remand the matter to the trial court to (1) determine whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement in count 1; and (2) recalculate Bichara’s custody credits. In all other respects, we affirm the judgment.

DISCUSSION³

Restraints

Bichara contends his rights to due process and a trial by a fair and impartial jury were denied because inadequate measures were taken to prevent the jury from seeing him physically restrained inside the courtroom during his trial.⁴ We disagree.

Proceedings

Before trial, the trial court ordered that Bichara be physically restrained by stealth belt while inside the courtroom.

During trial, defense counsel informed the court that one of the courtroom bailiffs, Deputy Lisa Debs, told her that one or more members of the jury may have seen the stealth belt being adjusted or placed on Bichara at two separate times that day. Deputy Debs told the court she was present during the first incident, which occurred that morning, but absent during the second incident, which occurred when her

³ Because the underlying facts of Bichara's conviction are not necessary to the resolution of his contentions on appeal, we do not include them here.

⁴ Bichara does not contest that there was a manifest need for restraints.

partner was securing the belt on Bichara as the jury was walking into the courtroom later that day.

The court clerk told the trial court that in the first incident, Deputy Debs was standing behind Bichara securing the stealth belt when the last juror to arrive looked through the courtroom window prior to the jury entering the courtroom. The trial court saw this first incident, and remembered seeing a deputy near Bichara when the juror looked through the window to wave to show he had arrived, but the trial court “didn’t see any action [by the Deputy] going towards [Bichara’s] belt.” The clerk agreed. The trial court stated, “There was none. So I was aware of that one. [¶] The second one I was unaware of, because when the jury is coming in, I tend to look over in their direction.”

The court clerk and the male deputy who was Deputy Debs’s partner⁵ stated that later that day the male deputy was leaning Bichara forward to secure the latch on the belt as the jurors walked into the courtroom. Bichara added that “Juror Number 12 looked right at [him]” as he was being secured. The trial court requested that sheriff’s personnel not allow the jurors in the courtroom until Bichara was secured in the future, and the court and parties agreed to discuss the situation further after lunch.

Following the recess, defense counsel moved for mistrial on the grounds of denial of the right to a fair trial, asserting that in the first incident a juror could potentially

⁵ The male deputy is not identified by name in the reporter’s transcript.

have seen the restraint and, more significantly, in the second incident at least one juror looked straight at Bichara while the Deputy attached the stealth belt and other jurors were in the same area. Counsel argued this second incident was particularly prejudicial because it conveyed that his client was so violent he had to be restrained. The prosecutor noted that the male deputy demonstrated how he had secured Bichara, and asked that the description be included in the record. She then stated that the male deputy indicated “that [Bichara] leaned forward, and that he reached behind [Bichara]. From where I was sitting, I couldn’t see exactly where his hand was going. I am to the left down a line of attorneys, and I don’t know specifically where one of the chain of jurors was coming in, but if they are on this line or back, I doubt they would have understood what they were seeing.” The trial court agreed and denied the motion, stating it was unwilling to assume the jurors saw or recognized anything that happened, but offered to conduct a further inquiry of the jurors to make a record and determine whether any jurors should be replaced. Defense counsel had initially stated she did not want the jurors questioned because it would highlight the issue, but after the trial court denied the request for a mistrial she requested they be questioned.

The trial court stated it was not going to highlight the problem by asking the jurors whether they had seen Bichara being secured to his chair, but would individually ask the jurors in an intentionally vague or “generic” manner

whether after the 11:00 a.m. break that day they saw “anything that caught your attention, or that you have questions about?” The trial court then did so, and all but two of the jurors responded they had not.

Jurors No. 2 and 12 responded affirmatively. The court first questioned Juror No. 2, the juror who had looked in the window earlier that day:

“[The Court]: Sir, when you, either this morning, and I know you were the last juror, not to pick on you, I know you were a little late this morning, but when you looked through the window, did you see anything unusual that caught your attention?

“[Juror No. 2]: No. She just said to flag her down.

“[The Court]: Thank you. [¶] After the 11:00 o’clock break this morning, did anything unusual, or anything catch your attention that happened here in the courtroom?

“[Juror No. 2]: As we were leaving?

“[The Court]: As you were coming back from the break.

“[Juror No. 2]: No, other than the bailiff or something was helping him with his shirt, or tucking his shirt in.

“[The Court]: Tucking his shirt in? That’s all?

“[Juror No. 2]: That’s all I noticed.

“[The Court]: Did that effect you in any way?

“[Juror No. 2]: No.”

The court later questioned Juror No. 12:

“[The Court]: This morning after the 11:00 o’clock break, when you guys were coming in, did anything happen

in the courtroom that caught your attention, or you have questions or concerns about?

“[Juror No. 12]: No. I mean I noticed something.

“[The Court]: When you say you noticed something, what did you notice?

“[Juror No. 12]: I think it was the bailiff with the defendant.

“[The Court]: Okay.

“[Juror No. 12]: That was just something I had never seen.

“[The Court]: What is it was [*sic*] that you saw that caught your attention?

“[Juror No. 12]: I really don’t know. I just glanced over, and it was something with a shirt.

“[The Court]: Okay. [¶] Does that cause you any concern, or affect you in any way?

“[Juror No. 12]: No.”

Following the questioning of all the jurors, including the alternate jurors, defense counsel stated she had a concern about Juror No. 12, explaining that counsel thought the juror was “reticent” and “suspicious” in that the juror’s responses were not “emphatic and forthright.” Counsel further explained she was not accusing the juror of anything, but believed “[the juror is] going to keep wondering about the incident” and seemed “mousy” (meaning not “terribly comfortable”). The trial court had watched the juror’s body language and did not notice anything to suggest the juror

was “holding back.”⁶ The trial court determined that “there is nothing that has affected this jury at all to prejudice Mr. Bichara,” and again admonished the deputies to take precautions to prevent the jurors from seeing Bichara being restrained, stating “we cannot and will not have another incident like this.”

Defense counsel then requested Juror No. 12 be excused and replaced with an alternate. The trial court denied the request: “In order to unseat a juror, there has to be some sort of misconduct on their part, or something that has so tainted their ability to be fair that it’s cause for removal. [¶] . . . [I]t’s not even close. I watched her and I didn’t see her demeanor being particularly different from Juror number 2 at what they thought of something. They looked over at your client and said, oh, something with the shirt. Juror number 2 thought it was a tuck. Juror number 12 wasn’t sure what it was, but they mentioned shirts. That’s all that was mentioned. [¶] I understand Mr. Bichara made eye contact with Juror number 12. Based on the configuration from where she’s standing and he is sitting, there’s no way, even if he was in the chair, to see where the stealth belt is.”

⁶ In making her arguments regarding the demeanor of Juror No. 12, defense counsel contrasted that juror’s demeanor with Juror No. 2, whom counsel described as “matter-of-fact” and “chill” about what Juror No. 2 saw. Counsel concluded from Juror No. 2’s body language that the juror had no concern about the incidents.

Analysis

“[I]t is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors. When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.” (*People v. Duran* (1976) 16 Cal.3d 282, 290.) However, “[t]he potential effect on the presumption of innocence is eliminated if the jury does not see the shackles. ‘We have consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury.’” (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583–584.) We are therefore far less concerned with physical restraints when there is no evidence that the jury saw the defendant in shackles.” (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1829, fn. omitted.)

In this case, the court questioned each juror individually and in a very general way to prevent the jurors from being influenced by one another’s answers and to ensure that the questioning itself did not suggest that the issue was whether they had seen Bichara in restraints. The vast majority of them noticed nothing at all, and the two jurors who did notice the bailiff’s actions did not indicate that they observed Bichara in restraints, but only noticed the bailiff doing something with Bichara’s shirt. Bichara

argues on appeal that whatever the jurors observed with respect to the Deputies doing something with his shirt was the equivalent of seeing him being “physically restrained.” The record does not support Bichara’s argument: both jurors who saw the bailiff doing something with Bichara’s shirt stated that what they observed did not affect them in any way, and the trial court apparently found the jurors credible. Because there is no evidence that any juror saw Bichara in restraints, or being restrained, we conclude that his argument that he was denied a fair trial is without merit.

Senate Bill 1393

Senate Bill No. 1393, signed into law on September 30, 2018, amends Penal Code sections 667 and 1385 to provide the trial court with discretion to strike five-year enhancements pursuant to section 667, subdivision (a)(1), in the interests of justice. The new law took effect on January 1, 2019, after Bichara had been sentenced. We agree with the parties that the law is retroactively applicable to Bichara because his appeal was not yet final on the law’s effective date. Accordingly, we remand the matter for the trial court to consider whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement.

Custody Credits

Bichara contends, and the Attorney General agrees, that the trial court erred by failing to recalculate the number of custody credits to which he is entitled, instead awarding the same number of credits it awarded at the first sentencing hearing. We agree that the trial court has a responsibility to recalculate custody credits on remand, and we remand the cause for that purpose. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 40–41.)

DISPOSITION

We remand for the trial court to consider exercising its discretion to strike the five-year section 667, subdivision (a) enhancement under Senate Bill No. 1393 and to recalculate Bichara's custody credits. The court is directed to amend the abstract of judgment and to provide a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

BAKER, J.